No. 10-0001

IN THE SPECIAL COURT OF REVIEW

Inquiry Concerning a Judge, No. 96

THE HONORABLE SHARON KELLER'S REPLY IN SUPPORT OF HER MOTION TO DISMISS

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ATTORNEYS FOR THE HONORABLE SHARON KELLER

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CONSTITUTION, STATUTES AND RULES

TO THE HONORABLE SPECIAL COURT OF REVIEW:

The Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals (the "CCA"), files this Reply in support of her Motion to Dismiss, and would show the Special Court of Review the following.

I. THE ORDER IS UNCONSTITUTIONAL

When construing the Texas Constitution, courts "rely heavily on its literal text and must give effect to its plain language." *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 355 (Tex. 2000). Where, as in this case, the Constitution's language is "clear and unambiguous, [the Court] must apply its words according to their common meaning without resort to rules of construction or extrinsic aids." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (construing statute). Here, the SCJC resorts to deleting text from the Constitution in order to reach its desired conclusion.

As explained in Judge Keller's Motion, the SCJC's Order, and Rule 10(m), on which it is based, conflict with the Texas Constitution. The Constitution plainly states that, once the SCJC initiates formal proceedings against a judge, the only punishment it may impose is a censure or a recommendation to remove the judge. To repeat the pertinent language of the Constitution for this Court yet again:

> After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education, ***or*** if the Commission determines that the situation merits such action, it may institute formal proceedings and order a formal hearing to be held before it concerning the censure, removal, or retirement of a person holding an office . . . or it may in its discretion request the Supreme Court to appoint an active or retired District Judge . . . as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. . . . If, *after*

> *formal hearing, or after considering the record and report of a Master*, the Commission finds good cause therefor, it shall issue an order of *public censure or it shall recommend to a review tribunal the removal or retirement*, as the case may be of the person in question . . ..

Tex. Const., Art. 5, § 1-a(8) (emphasis added).

This Court does not need to resort, as the SCJC now does, to arcane rules of statutory construction to interpret the plain words of the Constitution and how the Order violates its strictures. According to the SCJC, the Commission may impose a public warning at any time – as long as it is "[a]fter such investigation as it deems necessary[.]" *See* Response at 9, 10.[1] But the SCJC's reading of the text ignores the "or" in italics and bold in the quotation above. The Constitution, contrary to the Commission's convoluted interpretation of it, plainly says that the Commission may issue a public warning after its investigation ***or*** institute formal proceedings, in which case the punishments it may legally impose are confined to censure and removal/retirement. The plain language of the Constitution does not permit any other interpretation.

Judge Keller's reading of the Constitution is not, as the Commission now pretends, at all unusual. As pointed out in Judge Keller's opening brief, the Examiner herself shares Judge Keller's view – or at least she used to. Given the fact that her Response does not dispute her public statements on this issue, it is worth quoting the Examiner's pronouncements about the Commission's Order and public warning at length:

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[1] The Commission goes so far as to argue that the lack of as finding of good cause to punish Judge Keller actually justifies the imposition of an illegal sanction against her. *See* Response at 12.

> Seana Willing, the commission's examiner, contends in an e-mail that the order is based on a rule that does not comport with the Texas Constitution. . . .
>
> . . .
>
> She argues the commission should have based its order on the constitution, which allows the commission only three options after it begins formal proceedings against a judge and after a special master issues a report: issue a censure, recommend removal or retirement, or dismiss the charges.
>
> . . . .
>
> Willing . . . argues the commission based its order on a rule that provides a larger range of possible sanctions than the constitution does. As proof that the rule does not comport with constitutional requirements, she points to a disparity between it and a constitutional provision regarding the number of commission votes needed to form a majority. . . .
>
> . . . .
>
> According to Willing's e-mail, Rule 10(m) is inconsistent with Texas Constitution Article 5, § 1-a(8). In Willing's view, the Constitution controls.

M. A. Robbins, Bad Law? Judicial Conduct Commission Examiner Questions Basis for Public Warning in Keller Case, Texas Lawyer, July 22, 2010, App. B.

The SCJC's Examiner does not dispute the accuracy of her public remarks, which are corroborated by her e-mails to the *Texas Lawyer*. She now argues to this Court a position that is completely at odds with her public statements at the time of the SCJC's Order. As her public statements prove, the Examiner's argument for the constitutionality of the Order is merely rhetorical sleight of hand.

The SCJC's Response goes to great lengths attempting to reconcile Rule 10(m) with the Constitution. *See* Response at 8-13. What the SCJC completely ignores is the

fact that Rule 10(m) also conflicts with the Texas Government Code, which defines "formal proceedings" as "the proceedings ordered by the commission concerning the public censure, removal, or retirement of a judge." Tex. Gov't Code § 33.001(7).[2] The Government Code pointedly does not include "public warning" among the punishments the Commission may issue following formal proceedings. The plain words of the Government Code simply cannot be reconciled with the Commission's strained argument that formal proceedings can result in punishments other than public censure, removal, or retirement of a judge – such as the unconstitutional public warning issued by the SCJC.

II. THE COMMISSION WAS ILLEGALLY CONSTITUTED

The law and the relevant evidence concerning the qualifications – or, rather, the disqualifications – of Commissioners Fields, Cunningham, and Patterson, are before this Court and do not require further briefing.[3] The SCJC, however, makes certain arguments about the issue of the composition of the SCJC which do require rebuttal.

The Commission argues that it was Judge Keller's duty to have the disqualified Commissioners excluded from hearing her case by filing a quo warranto proceeding, and that, by failing to do so, she waived her objections to the Commission's composition. *See*

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[2] Judge Keller pointed out this additional flaw with the Order in her Motion at p. 11, fn. 6. The Commission simply ignores this problem with its interpretation of the Constitution.

[3] One substantive point does deserve brief mention. The Commission argues that Commissioner Fields was not disqualified from serving, notwithstanding the undisputed evidence that his term on the SCJC had expired. The Commission asserts that the "holdover" provision of the Texas Constitution means Commissioner Fields was not disqualified. But that provision of the Constitution applies only to "officers" of the State, and the SCJC has not offered any evidence that its volunteer members are State officers.

Response at 23-24. Putting aside the obvious fact that the burden is on the Commission to provide those it prosecutes with due process – Judge Keller is under no duty to do the Commission's work for it – Judge Keller did exactly what the rules require. What is shocking is that the Commission would make such an argument in the face of its own (once again) illegal conduct. It was not Judge Keller, it was the SCJC – or, more accurately, its Executive Director – who failed in her duties.

The Texas Government Code provides as follows:

> If the executive director has knowledge that a potential ground for removal of a commission member exists, the executive director shall notify the presiding officer of the commission of the potential ground. The presiding officer shall then notify the governor, the supreme court, the state bar, and the attorney general that a potential ground for removal exists. If the potential ground for removal involves the presiding officer, the executive director shall notify the next highest ranking officer of the commission, who shall then notify the governor, the supreme court, the state bar, and the attorney general that a potential ground for removal exists.

Tex. Gov't Code § 33.0041.

In this case, the SCJC does not deny that its Executive Director, Seana Willing, had "knowledge that a potential ground for removal of a commission member exist[ed],"[4] but it is also clear that Ms. Willing did not notify the presiding officer of the potential ground (and he, in turn, did not notify the governor, the supreme court, the state bar, and the attorney general). Instead, Ms. Willing – who was, and is, the Examiner prosecuting Judge Keller – dismissed the information she received from Judge Keller's counsel with the same explanations she now offers this Court. Even if one accepts Ms. Willing's

[4] Nor could it, because Ms. Willing was copied on the letter from Judge Keller's counsel pointing out the potential grounds for disqualification of the Commissioners. *See* App. T.

explanations as to why none of the Commissioners were disqualified (which Judge Keller certainly does not), that does not absolve Ms. Willing from her duty, as Executive Director of the SCJC, to obey the Government Code – for the law orders her to notify the presiding officer of any *potential* ground for disqualification of a Commissioner. Now Ms. Willing, in her role as Examiner, has the audacity to both ignore the Government Code and to blame Judge Keller for not having the disqualified Commissioners removed from hearing her case. The plain language of the Government Code proves that Judge Keller did not waive her objections to the disqualified Commissioners; rather, the Executive Director – and prosecuting Examiner – failed to abide by the law.

In addition, the Commission seeks to use its own secrecy as both a sword and a shield – saying that, like courts, its deliberations are secret, but also saying that, unlike courts, its votes are also secret. In the Commission's view, everything it does is legitimate – even when it violates the Constitution – and any criticism of its actions is mere "speculation." The Commission's protestations about the purity of its motives and the sanctity of its procedures are belied by its own words and the record of this case.

The Commission complains that there is no basis for saying that it acted against Judge Keller on the basis of only six votes – but that is what the Commission itself said in its Order.[5] The Commission plainly invoked the unconstitutional six-vote provision of Rule 10(m) – the rule it argues at length complies with the Constitution – in issuing its

[5] The SCJC explicitly stated that it could act "by affirmative vote of six of its members[.]" Order, App. A, at 17 (quoting Rule 10(m) (App. K)). The Constitution, however, requires the affirmative vote of seven members to recommend removal or retirement, or for public censure. Tex. Const., Art. 5, § 1-a(5) (App. G).

public warning against Judge Keller. Judge Keller did not speculate about that rule – the Commission quoted it as the sole authority for its unconstitutional sanction.

Finally, the Commission implies that its Order was unanimous[6] – but offers not a whit of evidence that anyone other than the Chair voted for it. In light of the fact that the Commission invoked the unconstitutional six-vote provision of Rule 10(m), the only logical conclusion is that only six Commissioners voted for the public warning.

III. THE ORAL EXECUTION-DAY PROCEDURES WERE NOT A LAW, CANON, OR RULE IMPOSING A SANCTIONABLE DUTY ON JUDGE KELLER

In her Motion, Judge Keller pointed out that the CCA's "oral protocol" was not a law, canon of conduct, or court rule the violation of which could be a cause for punishment by the SCJC. The SCJC does not refute this argument. Instead, in a footnote at the bottom of page 2 of its Response, Commission argues that because Judge Keller testified that the oral protocol contained the word "shall;" because she testified that "shall" means "mandatory;" and because she referred to the assigned judge in her testimony as the "duty judge;" that makes the oral protocol a duty of office.

There are two problems with the SCJC's argument. First, Judge Keller plainly testified that the oral protocol was not a law or court rule:

> Q. All right. Now, do you believe that this oral tradition that existed on September 25th of 2007 is a court rule, statute, constitutional provision or decisional law?
>
> A. I do not.

[6] Response at 17-18. Actually, the SCJC says that there is "no suggestion" that there was a dissenting vote. It is equally valid to assert that there is no suggestion that more than six Commissioners voted for the public warning.

Q. Let me focus on the phrase court rule. Why is the oral tradition later reduced to writing? That the oral tradition of the court protocol on September 25th is not a court rule within the meaning of the canon that you're accused of violating?

A. A court rule is something that is promulgated by a Supreme Court or the Court of Criminal Appeals, usually by the Supreme Court that is published for comment and reviewed and then adopted.

S. Keller Test., Tr. vol. 4, at 43:5-16 (App. Vol. 2 U). Indeed, when the Special Counsel asked Judge Keller whether the oral protocol was a duty of office, she said no:

Q. Don't you agree that part of your duties of office as a judge of the Texas Court of Criminal Appeals included, as with other judges, the responsibility to abide by the execution day procedures?

A. No, I would say that my responsibility to the other judges required me to abide by the procedures.

S. Keller Test., Tr. vol. 4, at 7:16-21 (App. Vol. 2 U). The SCJC's footnote argument that somehow Judge Keller testified that the oral protocol constituted a duty of office is conclusively refuted by the record.

Second, and more significantly, judges do not make up the duties of their offices; the office exists independently of the individual occupying it, and the duties of the office are established by law, not by the individual. The rules and laws governing Judge Keller and the CCA are codified in article 5 of the Texas Constitution, chapter 22 of the Texas Government Code, and the Texas Rules of Appellate Procedure. Judge Keller did not violate any of those rules and laws.

The SCJC cannot prosecute and discipline a judge unless they violate a law, court rule, or duty of office. The "oral protocol" simply was not a duty of office.

IV. JUDGE BERCHELMANN EXONERATED JUDGE KELLER

The Commission argues that Judge Berchelmann did not exonerate Judge Keller of the charges brought against her because he made some comments which were critical of her. There is no question that Judge Berchelmann did not find Judge Keller to be flawless; but that is not what the August 2009 trial was about, nor is it what this proceeding concerns. The trial concerned one issue: did Judge Keller violate any law, rule, code, or canon of judicial conduct. Judge Berchelmann said, quite clearly, that Judge Keller had not violated any written or unwritten rule or law.

That said, it is undeniable that Judge Berchelmann found fault with Judge Keller's conduct on September 25, 2007. The most that can be said of Judge Berchelmann's criticism, however, is that he found that Judge Keller erred in her judgment that afternoon. But an error in judgment is not cause for any sort of judicial discipline; the case law plainly holds that discipline may only be imposed for willful misconduct – conduct which constitutes "intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence." *In re Bell*, 894 S.W.2d 119, 126 (Tex. Spec. Ct. Rev. 1995) (citing *In re Thoma*, 873 S.W.2d 477, 489 (Tex. Rev. Trib. 1994)). "Willful conduct requires a showing of bad faith, including a specific intent to use the powers of office to accomplish an end which the judge knew or should have known was beyond the legitimate exercise of authority." *Id.* Judge Berchelmann found that Judge Keller did not commit any willful misconduct. Nor has there ever been any showing that she misused her office, as the case law requires, notwithstanding the SCJC's pronouncements in its unconstitutional Order.

V. TRIAL DE NOVO WOULD BE UNFAIR TO JUDGE KELLER

The Commission argues that this Court should conduct a trial de novo. As pointed out in her opening Motion, a trial de novo would wrongfully deny Judge Keller the benefit of her trial before Judge Berchelmann and reward the Commission for its unconstitutional conduct.

Judge Berchelmann held a four-day trial in August of 2009. He heard testimony from Judge Cheryl Johnson of the CCA; Dorinda Fox, the runner who called the CCA and decided not to file anything with the Court; Abel Acosta, the deputy clerk who received Ms. Fox's call; Melissa Waters, another paralegal who worked on Mr. Richard's case; David Dow, the attorney whose published lies about Judge Keller sparked the complaints that led to the SCJC's charges; Alma Lagarda, the first-year lawyer who drafted documents on behalf of Mr. Richard; Ed Marty, the CCA's General Counsel in September 2007; Gregory Wiercioch, Mr. Richard's lead attorney; Roy Greenwood, an expert on criminal appellate practice; and, of course, Judge Keller. Judge Berchelmann spent several months combing through the testimony and the hundreds of exhibits which were entered into evidence, drafting his Findings of Fact. The Commission would like all of that testimony, and especially the Findings of Fact, to disappear, since it led to the exoneration of Judge Keller and the finding that she did not violate any written or unwritten law or rule. Such a striking of the record would be profoundly unfair to Judge Keller, particularly since the provision of the Government Code allowing a trial de novo is for sanctions which can only be imposed prior to the filing of formal proceedings and trial. *See* Tex. Gov't Code § 33.034(e)(2).

In addition to the wrong that would be done by striking the record is the very significant expense that a new trial would impose on Judge Keller. The SCJC has no such worries, as Mr. McKetta (one of the original complainants against Judge Keller) is donating his services to the Commission for one dollar. Judge Keller's counsel, on the other hand, are prohibited (under a decision of the Texas Ethics Commission currently on appeal) from donating their services or even offering them at discounted rates. A new trial would be free for the SCJC (at least as to attorneys' fees), but will cost Judge Keller many thousands of dollars. It simply is unjust to allow the Commission to dramatically escalate the costs of this litigation when it already has been incredibly expensive.

Finally, as already stated in the Motion, the only reason a new trial is possible is because the Commission imposed an unconstitutional sanction against Judge Keller. Since the SCJC could not muster the votes for a punishment of censure or removal from office, its only choice was to dismiss the charges. Instead, it issued an illegal punishment so it could try its case yet again. That is not justice; it is vindictiveness.

VI. CONCLUSION

For the reasons set forth herein and in her Motion to Dismiss, The Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, respectfully asks the Court to vacate the July 16, 2010, Order of the State Commission on Judicial Conduct, direct the Commission to expunge that Order from its records, and render judgment that all charges against The Honorable Sharon Keller be dismissed.

Respectfully submitted,

/s/ Charles L. Babcock

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CERTIFICATE OF SERVICE

On September 16, 2010, the original and one copy of the foregoing Reply, with accompanying Appendix, are being filed with Blake A. Hawthorne, the Clerk of the Special Court of Review, by hand delivery with electronic copies to Blake A. Hawthorne and Claudia Jenks. The following have also been served with copies of the forgoing Reply and accompanying Appendix:

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